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Supreme Court, U.S.
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No. 95-562

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WALTER P. MAXWELL,
Petitioner,

v.

E-SYSTEMS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the unpublished per curiam decision of the court of appeals correctly applied well-settled summary judgment standards to the particular facts of this case in affirming the trial court's decision to enter judgment against the petitioner on his age discrimination claim.

STATEMENT REQUIRED BY RULE 29.6

The parent company of respondent E-Systems, Inc. is Raytheon Company. E-Systems, Inc. has no nonwholly-owned subsidiaries.

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent E-Systems, Inc. ("E-Systems" or "the Company") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the unpublished per curiam decision of the United States Court of Appeals for the Fourth Circuit.

This case involves nothing more than the straightforward application of this Court's settled summary judgment standards to the particular evidence adduced in the litigation. The court of appeals unanimously affirmed the district court's entry of summary judgment against petitioner Walter P. Maxwell ("Maxwell") on his age discrimination claim, because the evidence was insufficient to permit a reasonable factfinder to conclude either that E-Systems' asserted reason for demoting Maxwell—that he had negligently damaged property owned by a Federal Government customer—was untrue, or that the real

reason for the demotion was Maxwell's age. This determination has no significance beyond the confines of this specific litigation, a fact that the court of appeals recognized when it concluded there was no need even to publish its opinion.

The first "question" on which Maxwell seeks review—whether he established a *prima facie* case of age discrimination—is one that the court of appeals did not even reach. Even assuming that Maxwell could meet his initial burden of establishing a *prima facie* case, the Fourth Circuit held that he was unable to carry his ultimate burden of proving that but for his age, he would not have been demoted. This Court should not use its limited resources to consider a preliminary issue that was neither decided by the court of appeals nor necessary to its judgment.

Nor does the court of appeals' unpublished opinion—which, under the Fourth Circuit's own procedures, carries no precedential weight—present any question under this Court's decision in *St. Mary's Honor Center* v. *Hicks*, 113 S. Ct. 2742 (1993). Indeed, the court of appeals specifically acknowledged the interpretation of *St. Mary's* that Maxwell advocates but held that he could not meet his own standard: Maxwell was not entitled to a trial because he failed to raise a genuine issue either as to the credibility of E-Systems' asserted reasons for his demotion, or as to whether the real reason for his demotion was his age.

The remaining issues that Maxwell raises, as he himself acknowledges, Pet. 13, 18, simply go to the sufficiency of the evidence and are not worthy of this Court's plenary consideration. Maxwell does not allege any conflict between the Fourth Circuit's decision and that of any other court of appeals; rather, he simply argues that the court of appeals' application of settled summary judgment principles to the particular evidence before it was incorrect. That is certainly not a basis for the exercise of this Court's certiorari jurisdiction, and, in all events, the court of appeals' decision is correct. The petition should be denied.

COUNTERSTATEMENT

E-Systems produces electronics systems and products. The E-Systems division in which Maxwell is employed as an engineer is primarily engaged in defense-related contract work for the Federal Government. Pet. App. 2A.[1] Prior to his demotion, Maxwell's principal duties were as "site leader" on the CARDINAL project, a classified project for the United States Government. In this role, he was responsible for operations at a site where Government-owned property was being tested. He also supervised four subordinates. *Id.*; J.A. 83, 89, 117.

In May 1992, Maxwell was in charge of retrieving a Government-owned "test unit" at the CARDINAL site. Although his supervisors warned him to use automated retrieval equipment to approach the test unit and then switch to hand tools to retrieve it, Maxwell used only the bulky automated equipment. The test unit was damaged and critical data lost. E-Systems determined that the incident, which greatly upset the Government customer, resulted directly from Maxwell's negligence. Accordingly, Maxwell was orally reprimanded and warned. Pet. App. 2A; J.A. 71, 99, 106.

A similar incident occurred in January 1993, when Maxwell was in charge of another retrieval effort. Although he was advised to use hand tools throughout the process, Maxwell again used automated equipment. While Maxwell was operating the automated equipment, he looked away from the co-worker who was giving hand signals to guide him. The automated equipment contacted the test unit, and the unit was damaged. Following this incident, E-Systems lost substantial business from the Government customer, and its credibility suffered. Pet. App. 2A-3A; J.A. 72-74, 158-159.

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[1] "Pet. App." refers to the appendix to the petition for writ of certiorari. "J.A." refers to the Joint Appendix filed in the court of appeals.

Under the division's Procedures Manual—which provides that negligent damage to U.S. Government property is "of such a serious nature that a first occurrence will normally warrant discharge"—Maxwell could have been terminated outright. *Id.* at 169. Instead, after the second incident E-Systems decided to relieve him of his site-leader and supervisory responsibilities and demote him to the position of principal engineer with a salary reduction of about $10,000. The site-leader duties were reassigned to 53-year-old Larry Coughenour. Maxwell's supervisory duties were assumed by 32-year-old Frank Asencio (a principal engineer who had been hired in 1990 to add a further management layer to the CARDINAL staff) in addition to his own responsibilities. At the time of his demotion, Maxwell was 62 years old. Pet. App. 3A; J.A. 159.

Maxwell sued, alleging that he had been demoted because of his age in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 ("ADEA").[2] After discovery, the United States District Court for the Eastern District of Virginia granted summary judgment to E-Systems on two alternative grounds.

First, applying this Court's familiar *McDonnell Douglas* burden-shifting scheme for employment discrimination cases,[3] the district court held that Maxwell was unable

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[2] The ADEA prohibits employers from discriminating on the basis of age against employees who are at least 40 years old. 29 U.S.C. §§ 623(a)(1), 631(a).

[3] Under that scheme, the plaintiff has an initial burden of proving a *prima facie* case. The burden of production then shifts to the employer to state a legitimate, nondiscriminatory reason for the challenged employment decision. Once the employer does so, the plaintiff must "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 252-253 (1981). *Accord McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-804 (1973).

to carry his initial burden of proving a *prima facie* case of age discrimination. To establish a *prima facie* case, Maxwell was required to show that "(1) he was protected by the ADEA; (2) he was demoted; (3) at the time he was demoted he was performing his job at a level that met his employer's legitimate expectations; and (4) 'following his demotion, he was replaced by an individual of comparable qualifications outside the protected class.'" Pet. App. 13A (quoting *Mitchell* v. *Data General Corp.*, 12 F.3d 1310, 1315 (4th Cir. 1993)). The district court concluded that Maxwell could not satisfy the fourth element, because his duties were divided between two people, one of whom (Coughenour) was 53 years old, and thus well within the class of persons protected by the ADEA. *Id.*[4] Second, the district court held that, in any event, Maxwell was unable to prove by either direct or indirect evidence that E-Systems' asserted reason for his demotion —his negligent damaging of the test unit—was actually a pretext for age discrimination. *Id.* at 14A.[5]

The court of appeals affirmed without deciding the preliminary *prima facie* case issue, because it concluded that, in any event, Maxwell would not be able to carry his ultimate burden of proving discrimination at trial. *Id.* at 4A. The court of appeals observed that, as Maxwell had argued, he might survive summary judgment if "there was enough evidence to raise a genuine question regarding

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[4] The district court therefore did not need to decide whether Maxwell could satisfy the remaining elements of his *prima facie* case. We note that the district court's statement that the remaining elements were undisputed, Pet. App. 13A, is incorrect. E-Systems did not concede that Maxwell—after twice damaging property of a Federal Government customer—was meeting his employer's legitimate performance expectations. Defendant's Reply in Support of Motion for Summary Judgment at 13 n.9, J.A. 557.

[5] Maxwell's assertion to this Court that the district court judgment did not rest on alternative bases, Pet. 5-6 & n.3, is plainly incorrect, as the Fourth Circuit noted, Pet. App. 4A, and as Maxwell himself acknowledged in his initial brief to that court, *see* Brief of Appellant at 14-15.

whether the incidents" on which E-Systems relied in demoting him actually occurred as the Company claimed. *Id.* at 5A. The court of appeals held, however, that the record evidence was inadequate to "permit a reasonable person to conclude that the [test] units were not seriously damaged during the retrievals or that Maxwell was not responsible." *Id.* at 7A. "It is undisputed," the court of appeals emphasized, "that Maxwell was in charge" during the 1992 and 1993 incidents, "that he used automated equipment instead of the planned hand tools, that the units were damaged, and that the retrieval machine did contact the unit during at least the January, 1993, incident." *Id.* Maxwell's own deposition testimony "that the customer representative was not upset 'and appeared sympathetic' when informed of the January 1993 incident" did not, in the face of E-Systems' ample documentary and testimonial evidence to the contrary, suffice to create a genuine issue for trial. *Id.*

The court of appeals also held that Maxwell had failed to adduce sufficient evidence of discriminatory intent to warrant a trial. His sole evidence of discriminatory animus was his allegation that when the 53-year-old Coughenour was chosen to take over his site-leader duties instead of a 60-year-old named Stan Scalsky, a supervisor "commented on Scalsky's age and how it would be nice to have someone in the site-leader position with a little more longevity." *Id.* "Recognition of the effects of age and longevity of employees on long-range company planning is not discriminatory," the court of appeals observed, and "such evidence, without more, is an insufficient basis for relief in the face of proof of nondiscriminatory reasons for the employment action." *Id.* at 7A-8A.[6]

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[6] The court of appeals also affirmed the district court's entry of summary judgment for E-Systems on Maxwell's claim that he was demoted due to a disability in violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213. Maxwell does not seek review of that ruling. Pet. 4A n.4.

REASONS FOR DENYING THE WRIT

I. THIS CASE PRESENTS NO QUESTION CONCERNING THE ELEMENTS OF A *PRIMA FACIE* CASE OF AGE DISCRIMINATION, BECAUSE THAT QUESTION WAS NOT EVEN ADDRESSED BY THE COURT OF APPEALS AND WAS NOT NECESSARY TO ITS DECISION

Maxwell asks this Court to review the court of appeals' decision in order to resolve an alleged conflict concerning the elements of a *prima facie* case of age discrimination. That issue, however, is completely irrelevant to the judgment below. The court of appeals did not even reach the *prima facie* case question, and thus its decision is not in conflict with that of any other court on the matter. *See* S. Ct. Rule 10(a). Moreover, a hypothetical ruling favorable to Maxwell on this preliminary question would not have affected the outcome of the case.

Under this Court's precedents, establishing a *prima facie* case is only a first step toward proving employment discrimination under the *McDonnell Douglas* framework. Once the plaintiff makes a *prima facie* showing, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the challenged employment decision. When such a reason is given, the presumption of discrimination created by the *prima facie* showing "drops from the case," and the plaintiff bears the ultimate burden of proving not only that the employer's asserted justification is not credible, but also that the real reason for the challenged decision was impermissible discrimination. *St. Mary's*, 113 S. Ct. at 2747-48. *See also Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 252-253 (1981); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-804 (1973).

The court of appeals found it unnecessary to decide whether Maxwell could establish a *prima facie* case, because it concluded that, in any event, he was unable either to cast doubt on E-Systems' stated reason for his demotion

or to prove that he was demoted because of his age. Pet. App. 6A-8A. Any question concerning the elements of the *prima facie* case was therefore wholly irrelevant to the judgment. Even if the court of appeals had reached the question and adopted the approach Maxwell advocates, its judgment against Maxwell would have been the same, because he could not carry his ultimate burden of proving unlawful discrimination.[7]

It is well established that certiorari review is unwarranted where, as here, the issue on which review is sought is irrelevant to the outcome of the case. *See* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 172-173 (7th ed. 1993) (citing authorities). Thus, even if the alleged conflict to which Maxwell points were otherwise ripe for this Court's consideration,[8] it would provide no basis for granting review in this case.

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[7] Maxwell contends that the *prima facie* case issue merits this Court's consideration because the district court reached it, and, he claims, rested its decision entirely on that basis. Pet. 5-6 & n.3. This Court, of course, does not sit to resolve alleged conflicts between a district court decision and decisions of courts of appeals. *See* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 178-180 (7th ed. 1993). In any event, the district court did not base its decision solely on Maxwell's inability to prove a *prima facie* case. Like the court of appeals, the district court concluded that Maxwell would be unable to prove by either direct or indirect evidence that E-Systems' asserted reasons for his demotion were a pretext for age discrimination. Pet. App. 14A.

[8] Although it is not necessary to our argument, we note that any perceived "conflict" between other courts of appeals decisions on the appropriate formulation of the *prima facie* case will rarely, if ever, be dispositive. In the Fourth Circuit, a plaintiff who is unable to establish a *prima facie* case under the *McDonnell Douglas* formula is still permitted to prove discrimination by any direct or indirect evidence, using traditional proof methods. *See* Pet. App. 3A; *EEOC* v. *Clay Printing Co.*, 955 F.2d 936, 940 (4th Cir. 1992); *Lovelace* v. *Sherwin-Williams Co.*, 681 F.2d 230, 239 (4th Cir. 1982).

II. THIS CASE PRESENTS NO QUESTION UNDER *ST. MARY'S HONOR CENTER* v. *HICKS*, BECAUSE THE COURT OF APPEALS HELD THAT MAXWELL COULD NOT PREVAIL EVEN UNDER HIS OWN INTERPRETATION OF THAT CASE

In an effort to create a legal issue meriting review, Maxwell implies that there is some inconsistency between the court of appeals' decision and this Court's statement in *St. Mary's* that, in an employment discrimination case, "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity), may, together with the elements of the prima facie case, suffice to show intentional discrimination." 113 S. Ct. at 2749. *See* Pet. 16. There is no inconsistency; indeed, the court of appeals followed the very interpretation of *St. Mary's* that Maxwell advocates.

Before the court of appeals, Maxwell argued that, under *St. Mary's*, he could survive summary judgment if, in addition to proving a *prima facie* case, he could raise a genuine dispute about the truthfulness of E-Systems' asserted reasons for demoting him—even absent any other evidence of discriminatory intent.[9] The court of appeals' analysis is consistent with Maxwell's interpretation. The court stated that, on the particular facts of this case, Maxwell could proceed to trial if he adduced sufficient evidence *either* (1) "to raise a genuine question regarding whether the [test unit] incidents occurred" as E-Systems claimed—in other words, if Maxwell could raise a genuine question as to whether the Company's proffered reason for its decision was worthy of credence; or (2) to show that the Company's "proffered reason, however facially valid, was merely a cover for discrimination." Pet. App. 5A. In this case, the court reasoned, evidence of either type could permit the factfinder to " 'infer the ultimate fact of discrimination.' " *Id.* (quoting *St. Mary's*, 113 S. Ct. at 2749)).

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[9] Brief of Appellant at 32-36.

The court of appeals concluded, however, that on the actual evidence before it, no reasonable factfinder could find for Maxwell under either test. *Id.* at 6A-7A. Because the court applied the very test that Maxwell urges, this case presents no "legal" question warranting this Court's review as to the meaning of *St. Mary's* or the nature of evidence that is required to prove discrimination. Under any available theory, the court of appeals determined that Maxwell's evidence was insufficient to warrant trial.

III. THE COURT OF APPEALS' HIGHLY FACT-SPECIFIC DECISION WAS CORRECTLY DECIDED AND HAS NO SIGNIFICANCE BEYOND THE CONFINES OF THIS LITIGATION

Maxwell does not dispute the settled summary judgment standards that govern this case. Pet. App. 5A. There is no question that summary judgment should be denied only when the nonmoving party "set[s] forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). A mere scintilla of evidence in support of the nonmoving party's case will not suffice; rather, a genuine issue is raised only by evidence that would permit a reasonable jury to return a verdict in the nonmoving party's favor. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248, 252 (1986); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986).

The only issue that is actually presented in this case is whether the court of appeals correctly applied these well-settled standards to the particular facts adduced in the litigation. Pet. 12-18. Maxwell claims that the evidence created a genuine issue for trial; the court of appeals concluded that it did not. As this Court held long ago, certiorari is not granted "to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

That nothing more is at issue in this case is confirmed by the court of appeals' determination that its per curiam opinion did not even warrant publication. The Fourth Circuit publishes an opinion if

> (i) It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or (ii) It involves a legal issue of continuing public interest; or (iii) It criticizes existing law; or (iv) It contains an historical review of a legal rule that is not duplicative; or (v) It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit. [Fourth Circuit Internal Operating Procedure 36.4.]

Because the opinion below is unpublished, it has no precedential weight. *Id.* 36.6. The Fourth Circuit's disposition of the case, as that court recognized, is of moment only to the particular litigants before it. It presents no issues of broader significance justifying expenditure of this Court's limited resources on certiorari.

In any event, the court of appeals' decision is clearly correct. The court properly concluded that, on the record evidence, no reasonable jury could doubt that E-Systems demoted Maxwell—instead of terminating him, as company policy permitted—because of the test unit incidents. Pet. App. 6A-7A. There was no dispute that Maxwell alone "was in charge, that he used the automated equipment instead of the planned hand tools, that the units were damaged, and that the retrieval machine did contact the unit during at least the January, 1993, incident." *Id.* at 7A. Company documentary and testimonial evidence amply demonstrated that the demotion was primarily a customer relations issue. *Id.* at 6A.

Maxwell's effort to minimize the significance of the damage done to the test unit was based almost entirely on his own testimony—which was contrary to his admission that the 1993 incident was a "serious problem," J.A. 127—and on a report prepared by a low-level supervisor,

John Hale, whose opinion that Maxwell should not be relieved of his site-leader and supervisory responsibilities was not shared by more senior management employees who were responsible for the demotion decision. J.A. 59-61.[10] No other employee was similarly disciplined, because no other employee was twice in charge of operations that similarly damaged Government property. That Maxwell claimed to have spoken to a customer representative who was not visibly upset, and that the particular contract may have been extended, did not contradict the Company's evidence that the customer was astounded that the second incident had occurred and that the Company lost business and prestige as a result. J.A. 72-74, 158-159.

The court of appeals also properly concluded that Maxwell's proffered evidence of discriminatory animus was inadequate to warrant trial. Pet. App. 7A-8A. That evidence consisted of hearsay testimony regarding the decision to appoint 53-year-old Coughenour, rather than 60-year-old Scalsky, to the site-leader position. Even assuming that the hearsay would have been admissible at trial, the alleged comment that "it would be nice to have someone in the site-leader position with a little more longevity," *id.* at 7A, which was made in the context of long-range company planning and was not even about Maxwell, was plainly inadequate in the face of E-System's considerable evidence to the contrary to prove that Maxwell was demoted not because of the test unit incidents, but because of his age.[11]

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[10] Maxwell mischaracterizes Hale's report. Although Hale stated his opinion that the 1993 incident did not "significantly obscure" the test unit's failure mechanism and was not the cause of certain problems being experienced with the unit, his report nowhere states that the damage caused by the incident was only "minor" or "[in]substantial." Pet. App. 18A-19A.

[11] Hale's statement in his report that Maxwell should not be disciplined because he was "retirement age," Pet. 17, is hardly persuasive evidence that the managers who rejected Hale's recommendation intentionally discriminated against Maxwell on the basis of his age.

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,

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